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No. 94-329

In the

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS
OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, FAMILY RESEARCH COUNCIL AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *amici curiae* the Christian Legal Society, the Catholic League for Religious and Civil Rights, the Christian Life Commission of the Southern Baptist Convention, the Church of Jesus Christ of Latter-Day Saints, the Family Research Council and the National Association of Evangelicals move for leave to file the attached brief *amici curiae*.

Petitioners Ronald W. Rosenberger, *et al.*, consented to the filing of this brief *amici curiae*, but respondents Rector and Visitors of the University of Virginia, *et al.*,

refused to consent. The refusal of Virginia state officials to agree to the submission of this brief perhaps suggests the wisdom of our Framers in abandoning the English system for licensing publications. Petitioners' letter of consent has been lodged with the Court.

Amici are churches and religious organizations with an interest in freedom of religious speech and publication. Many public university students are members of churches affiliated with these *amici*, or otherwise participate in their ministries. A more complete statement of interest for each *amicus* is included in the appendix.

Since they regularly present religious viewpoints in the marketplace of ideas and because of their long involvement in issues of religious liberty, these *amici curiae* are able to provide the Court with a unique perspective on the First Amendment issues raised in the petition for writ of *certiorari*. *Amici* have not repeated the arguments made in the petition, but rather have focused on the place of religious speech in American history and, particularly, the history leading up to the adoption of the First and Fourteenth Amendments. The historical materials presented serve to place this case in its broader context and show the importance of the constitutional issues raised. *Amici* therefore request that the Court accept the accompanying brief for filing.

Respectfully submitted,

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Counsel of Record
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Samuel B. Casey
J. Randy Beck

INTERESTS OF *AMICI CURIAE*

The interest of each *amicus curiae* is set forth in the appendix.

ARGUMENT

Under the Fourth Circuit's reading of the Establishment Clause, a public university allocating funds for expressive activities must discriminate against religious students, even though such discrimination "violates the Speech and Press Clause" and is therefore "presumptively unconstitutional." Pet. App. 34a, 39a. All other students participate equally in campus life, regardless of viewpoint. Religious students, however, must censor their speech if they wish to satisfy university funding guidelines. Pet. App. 24a-26a.

The Fourth Circuit held that because *Wide Awake* publishes religious views, it is not entitled to the same speech and press freedoms as other publications. This analysis rests on two inaccurate premises. First, the court overlooks constitutional history when it reads the First Amendment to afford less protection to religious publications than to other members of the press. In Parts I and II of our brief, we show that the protection of religious speech was a central concern motivating both the First and Fourteenth Amendments.

Second, the Fourth Circuit wrongly assumes that religious expression is somehow distinct and severable from the political, philosophical and social discussion that occurs on public university campuses. On the contrary, religious speech often addresses issues debated in an academic setting, though from a distinctive perspective--one the Framers viewed as very important. In Part III, we show that the Fourth Circuit's attempt to artificially isolate religious speech from campus debate will impoverish discourse in public universities.

I. Publication of Religious Viewpoints Deserves the Highest Level of First Amendment Protection

A. Suppression of Religious Speech Was a Primary Defect of an Established Church

Early English emigrants to America included many religious refugees seeking to escape the influence of an established church. William Laud, Archbishop of Canterbury under Charles I, suppressed criticism of the Church of England and its hierarchy. One example gives a flavor of the times:

> In 1628, at [Laud's] instigation, a Puritan minister, Alexander Leighton, was indicted before the Star Chamber as the admitted author of a book that called the institution of bishops anti-Christian and satanic. He was put in irons and was kept in solitary confinement for fifteen weeks in an unheated cell "full of rats and mice, and open to snow and rain." His hair fell out, his skin peeled off. He was tied to a stake and received thirty-six stripes with a heavy cord upon his naked back; he was placed in the pillory for two hours in November's frost and snow; he was branded in the face, had his nose slit and his ears cut off, and was condemned to life imprisonment.

7 W. & A. Durant, *The Story of Civilization* 189-90 (1961). The brutal punishment of Leighton was aimed at both his deviance from the official orthodoxy of the established church and his temerity to spread his dissenting views through unlicensed publication. The Crown enforced religious orthodoxy by establishing the Church of England, and it sought to repress all forms of dissident speech, whether political or religious, by controlling the press through the notorious licensing system.

As search warrants from this period illustrate, the full severity of the licensing system was visited upon all religious and political dissidents, including Quakers and Roman Catholics. The term "seditious libel" referred not only to "treasonable" criticism of the Crown, but also to "scandalous" publication of "blasphemous" and "superstitious matter," including religious tracts or devotional material that were not in full conformity with the "doctrine and Discipline of the Church of England." *See, e.g., Copies Taken from the Records of the Court of King's Bench, at Westminster, Of Warrants Issued by Secretaries of State, etc.* 2 (Quaker), 5 ("Popish priest"), 15, 17, 27, 48 (publication of Roman Catholic manual of devotions), 49 (publication of Missals and Breviaries), 56, 74 (1763), *reprinted in The Literary Property Debate: Seven Tracts, 1747-1773* (P. Webb ed., 1974); *see also The Craftsman's Doctrine and Practice of the Liberty of the Press* 12, 20, 56-57 (1732), *reprinted in The Craftsman: Four Tracts 1731-1740* (1974). "Whether Catholics or Protestants, or Anglicans or Puritans, controlled the government, the compulsion of conscience for the sake of uniformity necessitated restraints on freedom of speech and press regarding religion." L. Levy, *Emergence of a Free Press* 5 (1985) (*"Emergence"*).

Persecution for religious speech was not as prevalent in America as in England. Nevertheless, there were still a number of attempts to suppress the speech of religious dissenters in the Congregationalist colonies of New England and the Anglican colonies of the South. For example, the first president of Harvard University, Henry Dunster, was convicted of breaching the peace and forced to resign after delivering sermons critical of infant baptism. C. Duniway, *The Development of Freedom of the Press in Massachusetts* 34-35 (1906); *Emergence*, at 26.

Quaker immigrants suffered particular persecution. Quakers were notorious for confronting ministers and other acts of defiance, such as walking about naked to symbolize the spiritual nakedness of the people. A 1656 statute adopted in five Puritan settlements denounced Quakers as "heretickes" who "speak and write blasphemous opinions" about the government and the church. The statute penalized Quakers arriving in the colonies, as well as the master of any ship bringing them. Four Quakers were executed in Massachusetts when they defied decrees of banishment and returned to the colony. Others "of both sexes were stripped and flogged from town to town." Rhode Island declined to join in deportation of Quakers, reasoning that they "delight to be persecuted by civil powers" and where they are "suffered to declare themselves freely, and are only opposed by arguments in discourse, there they least of all desire to come." L. Levy, *Blasphemy* 255-59 (1993).

Baptists were also targeted. John Clarke and Obadiah Holmes were punished and banished from Massachusetts in 1651 for preaching against infant baptism. *Blasphemy*, at 254. According to one estimate, about fifty Baptists suffered imprisonment in Virginia for crimes such as preaching in unlicensed houses, preaching without Episcopal ordination, holding religious meetings "in other manner than according to the Liturgy and Practice of the Church of England" and preaching the gospel contrary to the Book of Common Prayer. L. Levy, *The Establishment Clause: Religion and the First Amendment* 3 (1986).

Attempts to suppress religious speech flared up during the pre-Revolution religious revival known as the Great Awakening. As the revival spread through the colonies, evangelical Christians challenged the established churches, encouraging colonists to rely on religious experience, rather than simply accepting the teachings of the established clergy. T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 96-99 (1986). As a result of evangelical challenges, many of the colonies attempted to legally suppress the new movement, which was perceived as overly emotional. In 1741, the attorney general of South Carolina initiated a prosecution for criminal libel against the most successful evangelist of the period, George Whitefield, for an article criticizing the established church of Charleston. Whitefield was released on bail and no indictment was issued. *Emergence*, at 59. Virginia banned itinerant preaching by Presbyterian evangelicals in the 1740's. Curry, at 99. Connecticut banned itinerant preaching in 1742. *Id.* at 96-97.

Attempts by established churches to suppress dissenting religious speech were still occurring on the eve of the Revolution. In a 1774 letter, James Madison complained of the jailing of Baptist preachers in Virginia:

> This vexes me the most of any thing whatever. There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close [Gaol] for publishing their religious Sentiments which in the main are very orthodox.

5 *The Founders' Constitution* 60 (P. Kurland & R. Lerner eds., 1987).

B. The Desire to Protect Religious Speech Motivated Advocates of Press Freedom and Disestablishment

This history of suppressing religious speech provoked increasing pressure for freedom of the press, complemented by calls for an end to church establishments. These two movements coalesced in the drive for passage of the Virginia Act for Establishing Religious Freedom, shortly prior to adoption of the First Amendment.

1. English Advocates of a Free Press

The English Civil War displaced Laud and the Anglicans, and brought to power a Parliament dominated by Puritans and Presbyterians. The shift in the balance of power did not end the punishment of dissenting religious speech, however, merely changing for a time the definition of a dissenter. Nevertheless, the decade of the 1640's witnessed growing agitation for a wider freedom to publish religious views at odds with the prevailing orthodoxy. The most prominent advocate of a free press was John Milton, the Puritan pamphleteer who became Latin secretary to Oliver Cromwell's Council of State and later authored *Paradise Lost* and *Paradise Regained.* After Parliament passed a measure to control printing, Milton, without a license, published his *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England* (1644), *excerpted in* 1 *Norton Anth. of English Lit.* 1399 (4th ed. 1979).

Milton was merely the most prominent among several supporters of free religious expression. In 1644, *The Compassionate Samaritane*, by "Leveller" William Walwyn, advocated greater freedom of the press and the repeal of statutes limiting religious freedom. J. Frank, *The Levellers* 37 (1955). In his 1644 *Liberty of Conscience*, Henry Robinson promoted a complete freedom of the press in religious matters, extending beyond Protestants to "Papists, Jewes, Turkes, Pagans, Hereticks, with all Infidels & Misbeleevers." He argued for religious combat to be "fought out upon eaven ground, on equal terms, neither side must expect to have greater liberty of speech, writing, Printing, or whatsoever else, then the other." *Emergence*, at 93. Similarly tolerant was a 1646 reprint of an earlier tract by Leonard Busher, a Baptist, arguing that "all sorts of Christians; yea, Jews, Turks, and pagans," should be allowed "to write, dispute, confer and reason,

print and publish any matter touching religion, either for or against whomsoever." *Id.* at 101.

The opponents of state licensing of the press, including John Milton, often used theological arguments to attack this system of thought control. For instance, at the end of the 17th Century, an opponent of licensing writing under the pen name of "Philopatris" [lover of his country] noted the irony that this system of oppression

> robs us of that great Argument we make use of against the Mahometans; and what is worse, Popish religion, viz., That Ignorance is the Mother of their Devotions; since how can We justly brand their Religions, for being founded merely upon their Laicks Ignorance; when we in like manner discountenance Knowledge ourselves? How can we upbraid Papists for not daring to permit their Common people to read the Bible, when we do the same thing in effect, by tying all persons up to one man's Exposition and Interpretation of the same, viz., the Licenser's who will not permit any Exposition to come forth that thwarts his own particular Judgment.

A Vindication of Learning: or, An Humble Address to the High Court of Parliament in behalf of the Liberty of the Press (1679), *reprinted in Freedom of the Press: Four Tracts 1664-1693* (1975); *see also Reasons Humbly Offered for the Liberty of Unlicens'd Printing* (1693), *reprinted ibid.*

Later English advocates for freedom of religious expression exerted tremendous influence in the colonies. John Trenchard and Thomas Gordon worked in collaboration to publish *Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects.*

"In the history of political liberty as well as of freedom of speech and press, no eighteenth century work exerted more influence than *Cato's Letters*." *Emergence*, at 114. One letter, published in 1721, argued:

> As long as there are such Things as Printing and Writing, there will be Libels: It is an Evil arising out of a much greater Good. . . . I must own, that I would rather many Libels should escape, than the Liberty of the Press should be infringed; yet no Man in England thinks worse of Libels than I do; especially of such as bid open Defiance to the present Protestant Establishment.

1 *Cato's Letters* 252-53 (photo. reprint 1971).

Also carrying great weight in colonial thinking was the position of John Locke, who argued that external government coercion could not bring about "inward persuasion of the mind," the essence of "true and saving religion." Locke denied that the magistrate's power extended "to the establishing of any articles of faith, or forms of worship, by the force of his laws," since laws require penalties and penalties "are not proper to convince the mind." J. Locke, *A Letter Concerning Toleration* (1684), *excerpted in Locke and Liberty* 107, 110-11 (M. Salvadori ed., 1960).

As the Revolution approached, an English clergyman pointed to an established church as the cause of infringements on religious expression. Reverend Philip Furneaux published *The Palladium of Conscience*, arguing that "a national establishment is in its nature opposite to the genius of Christianity" since "[t]ruth can only be supported and propagated by reason and argument." P. Furneaux, *The Palladium of Conscience* 23 (photo. reprint 1974) (1772). Two editions of Furneaux's work circulated in America before the Revolution. *Emergence*, at 164.

2. The Colonial Drive for Press Freedom and Disestablishment

Two men in particular deserve credit for importing expansive notions of religious freedom to the American colonies. Roger Williams, a minister expelled from Massachusetts, founded Rhode Island, known thereafter as the most religiously tolerant of the colonies. Williams' most important defense of religious liberty, published in 1644, was entitled *The Bloudy Tenent of Persecution for Cause of Conscience*. Among other points, Williams sought to demonstrate that:

> It is the will and command of God, that (since the comming of his Sonne the Lord Jesus) a permission of the most Paganish, Jewish, Turkish, or Antichristian consciences and worships, bee granted to all men in all Nations and Countries: and they are onely to bee fought against with that Sword which is only (in Soule matters) able to conquer, to wit, the Sword of Gods Spirit, the Word of God.

3 *The Complete Writings of Roger Williams* 3 (1963). "Williams addressed *The Bloudy Tenent* to Parliament, which repaid the unsolicited compliment by ordering the common hangman to burn the book." C. Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 193 (1953).

Another importer of religious liberty to the colonies was William Penn, a Quaker and the son of an English admiral. Following restoration of the monarchy, Penn was imprisoned in the Tower of London on order of the Privy Council pending an investigation of one of his books for "blasphemy" (really heresy). After eight-and-a-half months in prison, Penn won his release by publishing a new work clarifying his views on the Trinity and the divinity of

Christ. *Blasphemy*, at 216-18. In 1671, while in prison again for preaching, Penn wrote *The Great Case of Liberty of Conscience*. Penn later founded the colony of Pennsylvania, which became a haven for Quakers. 8 W. & A. Durant, *The Story of Civilization* 255-56 (1963).

The increasingly popular notion of "freedom of the press" in the colonies included the freedom to publish one's opinions on matters of both government and religion. A 1734 article in the *American Weekly Mercury* defined "Freedom of the Press" to include liberty "for any Man to communicate to the Public, his Sentiments on the Important Points of Religion and Government." L. Levy, *Freedom of the Press from Zenger to Jefferson* 41 (1966). James Alexander, an attorney who participated in the defense of printer John Peter Zenger, wrote an essay arguing that "the Liberty of the Press is a liberty for every man to communicate his sentiments freely to the public, upon political or religious points." *Emergence*, at 126.

The growing respect for freedom of the press in the colonies occasionally led to jury nullification of government attempts to punish religious expression. For example, in a 1707 New York case, two Presbyterian ministers, Francis Makemie and John Hampton, were arrested for preaching without a license with intent to "spread their Pernicious Doctrine and Principles, to the disturbance of the Church by Law Established, and of the Government of this Province." The jury acquitted, quite possibly out of resistance to the notion that Anglicanism was the established religion of New York. *Emergence*, at 35-36; Curry, at 69-70.

Even voices within the established denominations joined in the call for freedom of religious expression. After Connecticut enacted its anti-evangelical law of 1742, Elisha Williams, former rector of Yale, published *The*

Essential Rights and Liberties of Protestants. Williams drew upon John Locke to proclaim the natural right of the religious person to determine the direction and expression of his conscience. While not opposed to an established church, Williams pointed to dangers from certain laws protecting the established religion. *See* R. Bushman, *From Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765*, 227-28 (1967).

Following the Revolution, the link between freedom of the press and the campaign for disestablishment was exhibited in the Virginia struggle for passage of the Act for Establishing Religious Freedom. Rejecting a proposal for tax-supported ministers, the Virginia Assembly instead adopted the statute drafted by Jefferson. The operative language provided that:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that *all men shall be free to profess, and by argument to maintain, their opinion in matters of religion*, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

5 *Founder's Constitution*, at 85 (emphasis added).[1] Implicit in the statute was an equation between the negative right to be free from compulsion by an established church and the

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[1]Funding a broad spectrum of speakers, including religious speakers, does not compel support of every message, but rather ensures robust discourse in the marketplace of ideas.

positive liberty to profess and argue for one's own religious views.

It was against this background that the First Amendment was drafted. Madison's original proposal for a Bill of Rights dealt with religious establishments in a different amendment from freedom of the press. It is appropriate that they were combined, however, because freedom of religious expression was a significant concern behind the Free Speech and Free Press Clauses. Likewise, the ban on an established church complemented the Free Press Clause, eliminating one of the primary reasons for government suppression of religious publications. As noted in the Williamsburg Charter, a bicentennial document signed by the Chief Justice, religious freedom "is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution." *The Williamsburg Charter*, 8 J. Law & Relig. 5, 8 (1990).

Thomas Jefferson, the founder of the University of Virginia, opposed an established church in order to protect citizens' freedom "to profess, and by argument to maintain, their opinion in matters of religion." There is great irony in the fact that Jefferson's University now contends that allowing religious students to freely express their views with the same privileges as other students would violate the First Amendment. The Court should reject the Fourth Circuit's conclusion that religious speech deserves less constitutional protection in our public universities than other types of speech.

II. The Fourteenth Amendment Was Also Motivated By a Desire to Protect Religious Expression

This Court has incorporated free press protections against the states through the post-Civil War Fourteenth Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Professor Amar argues that "when we 'apply'

the Bill of Rights against the states today, we must first and foremost reflect on the meaning and the spirit of the Amendment of 1866, not the Bill of 1789." Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1266 (1992).

Analyzing the intent of the Fourteenth Amendment Framers requires an understanding of the abolitionist movement which influenced the Republican Reconstruction Congress. A significant impetus behind the Fourteenth Amendment was a history of attempts by slave states to silence the religious speech of abolitionists.

The abolitionist movement was spearheaded by devout religious believers who proclaimed a law of higher authority than that of encoded state law. Combining theological insights with the rich American tradition of natural rights, these freedom fighters based their zeal to eradicate slavery on the premise that all human persons are created by God as equals, and that to assault human dignity through enslavement was an egregious sin. *See* Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513 (1974); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 Wis. L. Rev. 479 (1950).

Abolitionist Christians made moral appeals concerning the evils of slavery through speeches, sermons and publications. *See, e.g.*, Graham, at 486-93, 620-21. Theodore Dwight Weld, for example, converted by the preaching of attorney Charles G. Finney, turned out many pamphlets central to the movement, such as *Slavery As It Is* (1839), *The Bible Against Slavery* (1837), and *The Power of Congress over the District of Columbia* (1838). Graham, at 487, 490. The *Weekly Emancipator*, an abolitionist newspaper, was edited by minister-lawyer Joshua Levitt,

and one of the most influential texts of the movement, *Letters on American Slavery* (1823), was written by the Reverend John Rankin. *Id.* at 489, 621-22. The Fourth Circuit in this case considered it significant that *Wide Awake* has a cross printed on each page. Pet. App. 8a. Each page of William Lloyd Garrison's abolitionist paper, *The Emancipator*, had a cross and a biblical quotation at the top.

Antebellum southern states attempted to suppress speech and publications critical of slavery, and passed resolutions demanding that northern states do the same. *See* M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 28-50 (1986); Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699, 1713-17 (1991); Nelson, at 533-34. Several states criminalized abolitionist speech or banned members of abolitionist societies from their jurisdiction. *See, e.g.*, 1820 S.C. Acts 22-23; 1804 Ga. Laws 5-6; 1802 N.C. Sess. Laws 12-13. A Virginia statute, for example, provided:

> That any member of an abolition or anti-slavery society, or agent of an abolition or anti-slavery society, who shall come into this state, and shall here maintain, by speaking or writing, that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery, shall be deemed guilty. . . .

1836 Va. Acts 44. The Virginia statute required the postmaster to report publications or writings denying the right of masters to their slave property, and abolitionist literature detected in this manner was to be burned in the presence of the justice of the peace. *Id.* The *New York Tribune*, for instance, was banned by a Virginia postmaster under this law in 1859. Curtis, at 30-31.

Another effective tool of ideological suppression was mob violence and intimidation, undeterred by the police powers of the states. The Reverend Elijah Lovejoy, for example, edited the *Observer*, a weekly religious publication dedicated to anti-slavery ideals. After a St. Louis mob destroyed his office, he moved to Alton, Illinois. Lovejoy's press was repeatedly destroyed by angry pro-slavery crowds in Illinois. Finally, a mob set fire to the building containing his press. As Lovejoy fled the burning building, he was fatally shot in the chest. The mayor claimed the crowd was too strong to control. 1 H. Wilson, *History of the Rise and Fall of the Slave Power in America* 374-82 (1872).

Religious abolitionists shared the fundamental tenet that, as natural rights, the civil liberties enumerated in the Constitution should be applied to the states as well as the federal government. Graham, at 491-93. Many Republicans were heavily influenced by the religious movement for abolition, and shared the premise that the Bill of Rights should bind the states. Political leaders of the era who were converted by the abolitionist movement included Joshua Giddings, Salmon P. Chase and Thaddeus Stevens. *Id.* at 493. Evangelical anti-slavery strongholds in Ohio, New York and Pennsylvania elected such leading Republicans as John Bingham (drafter of section 1 of the Fourteenth Amendment), Philomen Bliss, William Lawrence, Giddings and others to serve in Congress prior to and during the Reconstruction. *Id.* at 492-93, 622-23. An 1856 Republican Party campaign slogan called for "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont." Amar, at 1276.

As the war neared an end, Representative Kasson noted that "the three great ecclesiastical bodies of this country, the Methodist, Presbyterian, and Baptist" had condemned slavery, "and that opposition has run through

nearly all the ecclesiastical organizations of the country ever since." The institution of slavery, however, "suppresses freedom of speech and of the press." "Who does not know that innocent ladies, cultivated, intelligent, Christian women, have been driven from the cities and States of the South. . .because they dared to say something offensive to this intolerant spirit of slavery?" Cong. Globe, 38th Cong., 2d Sess. 193 (1865). Congressman Ashley related that slavery "has for many years defied the Government and trampled upon the national Constitution. . . . It has silenced every free pulpit within its control." *Id.* at 138.

The southern history of suppressing abolitionists' speech was a significant concern of the Reconstruction Congress, and the protection of such religious expression was an important impetus in the framing of the Fourteenth Amendment. During debates over the post-war amendments, Congressman Price stated that "for the last thirty years a citizen of a free State dared not express his opinion on the subject of slavery in a slave State." Cong. Globe, 39th Cong., 1st Sess. 1066 (1866). Congressman Moulton offered a synopsis of the suppression of civil liberties in the states. "There is neither freedom of speech, of the press, or protection of life, liberty, or property." *Id.* at 1617. *See also* Cong. Globe, 38th Cong., 2d Sess. 142 (1865) (remarks of Rep. Orth); Cong. Globe, 38th Cong., 1st Sess. 2615 (1864) (remarks of Rep. Morris); Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871) (remarks of Rep. Bingham).

It is settled law that the Fourteenth Amendment created a constitutional mandate that states adhere to the protections of the Bill of Rights. The abolitionist background leading up to the Fourteenth Amendment suggests that a particularly high constitutional value should be placed on the right of religious individuals to freely

express their views. Just as with the history of the First Amendment, the Fourth Circuit's decision again subverts constitutional history by holding that the Religion Clause imposes special disabilities on religious expression.

III. The Fourth Circuit's Decision Will Impoverish Discourse at Public Universities

One unfortunate consequence of the Fourth Circuit's ruling is that it will tend to isolate students from the expression of religious viewpoints on public issues. Religious discourse has played an enormously significant role in our nation's history and in the resolution of many of our most important controversies. The public university is intended to be a marketplace of ideas. *Healy v. James*, 408 U.S. 169, 180 (1972). By discriminating against student religious speech, the University of Virginia imposes a secularism on the student body that impoverishes campus debate.

From the birth of our nation, religious ideas have played a critical role in our national biography. Religious expression played a significant part in motivating colonists to join the struggle for independence. Historian Arthur M. Schlesinger notes that, along with lawyers, "the clergy provided the most articulate spokesmen for the cause." A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 10 (Northeastern ed., 1980) (1957). Traditional days of fasting and thanksgiving, in the words of British General Gage, provided "an opportunity for Sedition to flow from the Pulpits." *Id.* at 31-32. New England Congregational ministers "'represented the cause of America as the cause of heaven,' or, as a British sympathizer said, they sounded 'the Yell of Rebellion in the Ears of an ignorant & deluded People.'" *Id.* at 11. Presbyterian clerics in the Middle colonies "proclaimed similar doctrines." *Id.*

In an 1818 letter, John Adams identified Doctor Jonathon Mayhew as "[a]nother gentleman, who had great influence in the commencement of the Revolution." Rossiter, at 228. For instance, in a sermon against *Unlimited Submission*, Mayhew laid out circumstances in which Christians are not obliged to obey the government. *Id.* at 240. Likewise, John Witherspoon, a Presbyterian minister and president of the College of New Jersey (Princeton), "besides writing for the newspapers, became a member of the Second Continental Congress and signed the Declaration of Independence." Schlesinger, at 12.

The role of religious expression in the abolitionist movement has been documented above. Abraham Lincoln similarly filled his speeches with biblical quotations and allusions. *See* G. Wills, *Under God: Religion and American Politics* 207-21 (1990). In one speech, Lincoln speculated that the Civil War was God's judgment on both North and South for the sin of slavery. *Id.* at 218. In the Gettysburg Address, Lincoln drew on New Testament imagery, expressing the desire "that this nation, under God, shall have a new birth." *Id.* at 212.

As a nation, we now celebrate annually the birth of a clergyman. 5 U.S.C. § 6103. The Reverend Martin Luther King, Jr., head of the Southern Christian Leadership Conference, acknowledged the religious roots of the movement for civil rights:

> From the beginning a basic philosophy guided the movement. This guiding principle has since been referred to variously as nonviolent resistance, noncooperation, and passive resistance. But in the first days of the protest none of these expressions was mentioned: the phrase most often heard was "Christian love." It was the Sermon on the Mount, rather than a

> doctrine of passive resistance, that initially inspired the Negroes of Montgomery to dignified social action. It was Jesus of Nazareth that stirred the Negroes to protest with the creative weapon of love.

A Testament of Hope: The Essential Writings of Martin Luther King, Jr. 16 (J. Washington ed., 1986); *id.* at 17 ("Christ furnished the spirit and motivation, while Gandhi furnished the method."). Before the Lincoln Memorial in Washington, D.C., Dr. King shared his "dream" of the millennial Kingdom, where "every valley shall be exalted, every hill and mountain shall be made low, the rough places shall be made plain, and the crooked places shall be made straight and the glory of the Lord will be revealed and all flesh shall see it together." *Id.* at 219; Wills, at 203-04.

Numerous other instances could be cited in which our national dialogues have been conducted in explicitly religious terms. These are not simply historical curiosities from a more religious past, but rather reflect an ongoing fact of our communal life. The President recently delivered a sermon in favor of his crime bill at a Maryland church, *New York Times*, Aug. 15, 1994, at A12, and black church leaders have been encouraged to preach about the need for health care reform, *New York Times*, Aug. 24, 1994, at A10.

There is nothing untoward about permitting religious discussion as part of the debate on public university campuses. As former Judge Arlin Adams of the Third Circuit has explained:

> Although the Founders represented a spectrum of views, they were virtually unanimous in the belief that the republic could not survive without religion's moral influence. Consequently, they

> did not envision a secular society, but rather one receptive to voluntary religious expression.

A. Adams & C. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 31 (1990). *See id.* at 21 (George Washington), 25 (James Madison), 27 (John Adams).

The Fourth Circuit's decision veers from the religious pluralism of the Founders toward a relentlessly secular society, where religious expression is frowned upon and religious persons are denied the privileges afforded other citizens. Rather than promoting free and open exchange in the marketplace of ideas, the court encourages students to hide the religious bases for their opinions, or leave them unexamined. University students will be less likely to encounter religious perspectives on issues such as racism, crisis pregnancy, homosexuality and the relative morality of capitalism and socialism—all addressed by *Wide Awake*, Pet. App. 6a-7a—even though religious perspectives may play a significant role in dealing with those very issues outside the university context. If religious voices are heard at the University of Virginia, under the Fourth Circuit's ruling, it will be from denominations wealthy enough to supply the funding the school discriminatorily denies. Inevitably, students will graduate with a hollower education than they might have had.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the petition for a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit be granted.

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APPENDIX
Statements of Interest

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the Framers' notion of human freedom. The state has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and nonnegotiable prohibition

attached to this, our First Freedom, is "Congress shall make no law. . . ."

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. It defends the right of Catholics -- lay and clergy alike -- to participate in American life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League recognizes the importance of defending the religious freedom rights of all Americans and is thus prepared to defend those rights in court.

The Southern Baptist Convention (SBC) is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. **The Christian Life Commission (CLC)** is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases, such as this case.

The Church of Jesus Christ of Latter-Day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 9 million with more than 17,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let

them worship how, where, or what they may." Article of Faith No. 11, The Church of Jesus Christ of Latter-Day Saints.

Family Research Council (FRC) conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.